In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE STATE OF NEBRASKA,
No. 127 (345)

and

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE STATE OF NEBRASKA.
No. 125 (346)

SUPPLEMENTAL BRIEF.

First.

The authorities hereinafter referred to will confirm the contention made in the oral argument that the act, on its face, is void, because it provides for an indefensible classification prohibited by the Federal Constitution.

The first clause of the first section requires that "every railroad corporation shall give to *all* persons and associations reasonable and *equal* terms, etc." but only "persons or associations who desire to erect and operate, or who are engaged in operating grain elevators, or in handling or shipping grain, etc.," may make the application, or have a right to a side track or switch, and *that* right, by the *proviso* to the section, is restricted to "elevators, hereafter constructed," having a capacity of fifteen thousand bushels. The shippers of stock—of coal—of lumber—of merchandise,—are excluded from the operation of the act. No one may claim its benefits but the "person or association" which owns or desires an elevator.

Gulf, Col. & Santa Fe v. *Ellis*, 165 U. S., 150;
Storck v. *Baltimore*, 101 Md., 476;
McKnister v. *Sager*, 163 Ind., 671;
State v. *Haun*, 61 Kan., 146-154;
Cotting v. *K. C. Stock Yards*, 183 U. S., 79;
State v. *Mitchell*, 97 Me., 66;
Brimmer v. *Rebman*, 138 U. S., 78.
Henderson v. *Mayor*, 92 U. S., 259, 268.

It is respectfully submitted that the opinions of the State Court (81 Neb. 17, and 81 Neb. 174), in these two cases, are not based upon the theory that the application for side tracks or switches in these two cases were "reasonable," but solely upon the theory that the law requiring the construction of the side track or switch, when demanded, was the proper exercise of a legislative function. The information in the criminal case (No. 127) is not drawn upon the theory

that the demand was "reasonable," but upon the theory that the mandate of the statute had been disregarded,—and the same is true of the petition for mandamus in the civil case. (No. 128.)

Is not our contention fully sustained by the opinion of Justice Holmes in re *Louisville R. R. Co.* v. *Stock Yards Co.*, 212 U. S., 144, in which he says that:

> "It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from or undue detention of cars, *and for securing due compensation for their use.*"
>
> "The Constitution of Kentucky is simply a *universal undiscriminating requirement*, with no adequate provision such as we have described. The *want cannot be cured* by inserting them in judgments under it. *The law itself must save the parties rights, and not leave them to the discretion of the courts, as such.*"

There is nothing in the opinions of the state courts indicating that the railroad company had been guilty of any discrimination against these elevator companies, *except in the refusal to give them a site or location* on the right-of-way,—which this Court held, in the case of *Mo. P. R. R. Co.* v. *Nebraska*, 164 U. S., 403, was not a discrimination, but the exercise of a lawful right. *Otherwise there is nothing in the record to indicate discrimination, or that the elevator companies were denied facilities accorded to others, under like circumstances.* If the elevators located on the rght-of-way had been located on ground of the owners,

and they enjoyed the use of a side track or switch, which was denied to the Manley and the Farmers' elevators, under like conditions, there might be some ground for the statement of unjust discrimination.

It is provided in the first section of the Hepburn Bill that:

> "Any common carrier subject to the provisions of this act, upon application of any * * * shipper tendering interstate traffic for transportation, shall construct, maintain and operate, *upon reasonable terms*, a switch connection, etc. * * * where such connection is *reasonably practicable*, and can be put in *with safety*, and will *furnish sufficient business to justify* the construction and maintenance of the same, etc." * * * And on failure to do so, "the Commission shall *hear* and *investigate*, and shall *determine* as to the *practicability* thereof, and the *justification* and *reasonable* compensation therefor, etc."

Not so the statute of Nebraska, until the legislature, in 1907, recognized the injustice of the Act of 1905, and provided for a judicial tribunal to *hear* and *investigate*, after notice, and for due compensation.

We submit, however, that if the Court will examine the statute of 1905, as copied in 81 Neb. 16, it will be seen that the first clause of the first section, down to the word "same," in line 13, has no connection with the remainder of that section, and that the remainder of the section should be construed as an independent section, in no manner affected or controlled by what precedes it. The State Court construed the law (81 Neb. 17), 1905, to have been enact-

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ed for the sole purpose of enabling the farmers to overcome what was believed to be a "combination existing between the grain dealers and owners of existing elevators," etc., at the same time admitting (81 Neb. 22) that: "It may be that the elevator facilities furnished by two elevators erected and doing business prior to the building of the elevator in question would, under proper management, accommodate the trade at that station, etc."

Again, it is stated (81 Neb. 177-178) that:

> "It is true that there are one or more elevators at the station of Strausville, but the farmers in that vicinity do not seem willing to deal with the parties operating them, etc."

The whole tenor of the two decisions of the state court is to the effect that it was the duty of the railroad company to obey the legislative fiat, and that it had no right to any notice or hearing before any judicial or administrative tribunal, and no right to demand compensation for its property taken and appropriated for a private use and purpose.

The attention of the Court is specially called to the order and judgment of the district court. In the criminal case No. 127 (345), (Abst. p. 10), the penalty of $500 is assessed. In the civil case No. 128 (346), (Abst. p. 15), no finding of fact was made, except that the railroad company had failed to build the track as demanded, and as required by the statute.

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Second.

It is conceded that the Missouri Pacific Railway Company is a foreign corporation, incorporated under the laws of the state of Missouri, and admitted to do business in the state of Nebraska as an interstate common carrier. The record shows without contradiction or dispute that the tracks and terminals at each of the stations of Manley and Strausville were used by the company as such interstate carrier, and in the prosecution of the interstate business. The company was admitted to do business in the state as an interstate carrier, without restriction or limitation as a condition of such admission.

(See the decision of this Court in the case of *West. Un. Tel. Co.* v. *State of Kansas*, decided January 17th, 1910.)

The Hepburn act, as amended June 29th, 1906, provides that:

> "The provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, etc."

As before stated, it is established that the Missouri Pacific Railway Company, being such interstate carrier, comes within the operation of the Hepburn act. It is further provided that the term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, * * * and shall also include all switches, spurs, tracks and terminal facilities, of every kind, used or necessary in the transportation of persons or property

designated herein; and also all freight depots, yards and grounds used or necessary in the transportation and delivery of any of said property, etc.

It is conceded—or at least it will not be disputed—that the depot grounds, tracks and terminals of the Missouri Pacific Company at the stations of Manley and Strausville are used and necessary for use in the prosecution of its business as an interstate carrier. We therefore insist, within the decisions of this Court, that the regulation and control of such depot grounds, yards and terminals, switches and spur tracks are, by the express provisions of an act of Congress, withdrawn from the jurisdiction and control of the state. Evidently Congress had some object in view in its most careful selection of words in the Hepburn Bill to express its meaning and intention,—and especially in section one of the act. If those words are given their ordinary acceptation and significance, it cannot be that the legislature of the state of Nebraska had jurisdiction and power to pass the act under which the proceedings in these two cases are being prosecuted.

Sturges v. *Crowinshield*, 4 Wheat., 122;
Brown v. *Maryland*, 12 Wheat., 419;
Wilson v. *Blackbird*, 2 Pet. (U. S.), 245;
Cooley v. *Board*, 12 How. (U. S.), 299;
R. R. Co. v. *Fuller*, 17 Wall., 568;
Welton v. *State*, 91 U. S., 281;
Henderson v. *Mayor, etc.*, 92 U. S., 271;
Sherlock v. *Alling*, 93 U. S., 103;
R. R. Co. v. *Husen*, 95 U. S., 469;
Hall v. *DeCuir*, 95 U. S., 499;
Mobile v. *Kimball*, 102 U. S., 702;

Gloucester Ferry Co. v. *Penn.*, 114 U. S., 204;
Brown v. *Houston*, 114 U. S., 632;
Walling v. *Michigan*, 116 U. S., 455;
Pickard v. *Pullman Co.*, 117 U. S., 49;
Wabash Co. v. *Illinois*, 118 U. S., 569-577;
Robbins v. *Shelby, etc.*, 120 U. S., 494;
Fargo v. *Mich.*, 121 U. S., 245-247;
Bowman v. *Ry. Co.*, 125 U. S., 490;
Stoutenburgh v. *Hennick*, 129 U. S., 148;
Leisy v. *Hardin*, 135 U. S., 108;
McCall v. *Cal.*, 136 U. S., 108;
In re *Raher*, 140 U. S., 555;
Brennan v. *Titusville*, 153 U. S., 300-303;
Covington v. *Kentucky*, 154 U. S., 209-223;
Inter. Com. v. *Brinson*, 154 U. S., 470.
U. S. v. *Knight*, 156 U. S., 11-12;
Gulf Ry. v. *Hepley*, 158 U. S., 104;
Rhodes v. *Iowa*, 170 U. S., 412-425;
Scranton v. *Wheeler*, 179 U. S., 160;
R. R. Co. v. *Eubanks*, 184 U. S., 38-43;
Kelley v. *Rhoads*, 188 U. S., 5-10;
In re *Lottery Case*, 188 U. S., 358;
Stockyards v. *Ry. Co.*, 192 U. S., 568;
Johnson v. *S. P. Co.*, 196 U. S., 21-22;
McNeil v. *South R. Co.*, 202 U. S., 558;
T. & P. Ry. Co. v. *Abilene*, 204 U. S., 426;
Schemmer v. *Ry. Co.*, 205 U. S., 1;
Armour Pck. Co. v. *U. S.*, 209 U. S., 78;
(And many other kindred cases.)

In these decisions this Court has consistently held that the power of Congress "embraces within its control all instrumentalities by which that (interstate) commerce may be carried on, and the means by which it may be aided and encouraged;" that as to some of the powers "which are local and limited in their nature or sphere of operation, the states may prescribe regulations *until Congress intervenes, and assumes control of them;*" *"that if Congress had passed any act which bore upon the case—any act in execution of the power to regulate commerce,"*—the jurisdiction of the state was at an end; that whatever "Congress determined, either as a *regulation* or liability for its infringement, is exclusive of state authority."

Leisy v. *Hardin*, 135 U. S., 107-125;
Armour v. *U. S.*, 209 U. S., 78;
Texas & Pac. Ry. Co. v. *Inter. Com. Comm.*, 162 U. S., 197;
Austin v. *Tenn.*, 179 U. S., 370-375;
Gulf Ry. Co. v. *Hepley*, 158 U. S., 104;
Tex. & Pac. Ry. v. *Abilene Co.*, 204 U. S., 430-448;
U. S. v. *Frt. Assn.*, 166 U. S., 312;
Johnson v. *S. P. Co.*, 196 U. S., 21-22.

When Congress amended the Interstate Commerce Act, and provided that the term "railroad" should "include all switches, spurs, tracks and terminal facilities, of every kind, used or necessary in the transportation of persons and property designated herein; and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of such property,"—did it not intend to place such

instrumentalities under the exclusive control of the agencies of the Federal Government? If not, what was the purpose of Congress? Could language be plainer or more significant? If the "switches, spurs, tracks and terminal facilities" referred to in the amendment are not instrumentalities of interstate commerce, when connected with the railroad of an interstate carrier, and whose road is operated as a unit, then what relation do they bear to such commerce and such carrier? Without the "railroad" and its "switches, spurs, tracks and terminal facilities," the carrier could not engage in the business of an interstate carrier.

Gloucester Ferry Co. v. *Penn.*, 114 U. S., 204.

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